

AMERICAN BUFFALO:  
VANISHING ACQUITTALS AND THE GRADUAL EXTINCTION OF  
THE FEDERAL CRIMINAL TRIAL LAWYER

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In response to Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

It is no secret that trials are a dwindling feature of the American legal landscape. In state courts, both the absolute number of civil and criminal trials and the percentage of civil and criminal cases resolved by trial declined markedly in the past quarter century.<sup>1</sup> The downward trends are even more pronounced in the federal system. In federal courts, the percentage of civil cases concluded by either a bench or jury trial dropped from 11.5% in 1962 to 1.8% in 2002.<sup>2</sup> Between 1980 and 2002, the federal criminal trial rate plummeted from 23% to 4.8%.<sup>3</sup> Not only are both state and federal trendlines down, but the number and percentage of civil and criminal cases that go to trial are now so small that a cottage industry has arisen to study the “vanishing trial.”<sup>4</sup>

Professor Ronald Wright has opened a new subfield in the vanish-

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<sup>1</sup> A study of thirteen states showed that felony jury trial rates decreased from 5% in 1976 to 2% in 2002. Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 765 (2004). The civil jury trial rate in twenty-two states fell from 1.8% in 1976 to 0.6% in 2002. *Id.* at 768.

<sup>2</sup> Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004).

<sup>3</sup> Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90, 91 fig.1 (2005).

<sup>4</sup> The ABA Section of Litigation underwrote a study of the vanishing trial phenomenon that produced a collection of fascinating papers. For an overview, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). The topic has spawned other articles and symposia. See, e.g., John Lande, *Introduction to Vanishing Trial Symposium*, 2006 J. DISP. RESOL. 1, 2–4 (describing the contents of succeeding articles analyzing the vanishing trial phenomenon published in connection with a symposium sponsored by the University of Missouri-Columbia Center for Dispute Resolution).

ing trial genre by noticing and perceptively analyzing the curious fact that the rate of acquittals in federal criminal cases has declined even faster than the rate of guilty pleas has increased.<sup>5</sup> In seeking explanations for what he calls “the end of innocence,”<sup>6</sup> Professor Wright looks primarily to factors that can be quantified and included in a regression analysis. In what follows, I have little but admiration to offer for his impressive quantitative work. Likewise, I concur with Professor Wright’s conclusion that one significant factor driving down both federal trial and acquittal rates is the government’s use of the markedly increased bargaining leverage afforded to prosecutors by the post-1987 federal sentencing system consisting of the U.S. Sentencing Guidelines interacting with various statutory mandatory minimum penalties.<sup>7</sup> Indeed, in Part I of this Response, I offer a bit of additional evidence to support that proposition.

That said, I am not entirely convinced that Professor Wright’s proposed explanations for the disproportionate decline in federal acquittal rates capture the whole story. In Parts II and III of this Response, I suggest that acquittals may be vanishing in part because a once-common courtroom denizen—the true trial lawyer—is becoming an endangered species, particularly in U.S. Attorneys’ Offices. Even where those exotic creatures still roam, the system they inhabit provides ever-greater disincentives to trying the kind of cases in which acquittal is a live possibility.

I conclude by wondering if the slow extinction of the federal criminal trial lawyer may be having deleterious effects that extend beyond the declining frequency of federal criminal trials and acquittals.

#### I. THE POSITIVE CORRELATION BETWEEN USE OF PROSECUTORIAL BARGAINING POWER AND PLEA RATE

Professor Wright’s conclusion that the increased prosecutorial influence over sentencing outcomes afforded by the U.S. Sentencing

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<sup>5</sup> See Wright, *supra* note 3, at 101-06 (providing compelling data in graphical form).

<sup>6</sup> *Id.* at 79.

<sup>7</sup> *Id.* at 150-54 (arguing that the most effective reforms of sentencing laws should be those that reduce prosecutorial power “to link sentence discounts to the defendant’s choice to plead guilty”). This conclusion is consistent with my own critiques of the current operation of the federal sentencing system. See, e.g., Frank O. Bowman, III, *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1336-40 (2005) (contending that prosecutorial power has increased due to the complexity of the system).

Guidelines and associated provisions<sup>8</sup> has increased the rate of guilty pleas is based on three interlocking premises:

- (1) The Guidelines, mandatory minimum sentence statutes, and other recent federal sentencing innovations significantly increased the nominally applicable sentence for many common federal crimes.<sup>9</sup>
- (2) The Sentencing Reform Act of 1984<sup>10</sup> and the Guidelines provided prosecutors with an array of discretionary mechanisms to lower a defendant's nominal sentence in return for a plea of guilty, an agreement to cooperate, or both.<sup>11</sup>
- (3) Federal prosecutors use available sentence bargaining mechanisms in ways and to degrees that vary between districts and over time.<sup>12</sup>

All three premises are demonstrably true, but to prove empirically that the increased bargaining leverage latent in the Guidelines' structure has indeed affected plea rates, one must show that differences in prosecutorial use of available mechanisms to reduce defendants' sentencing exposure correlate with differences in plea rate, either horizontally, from district to district, or longitudinally, from year to year.

Professor Wright's multivariate analysis finds positive correlations between an increased plea rate and certain methods of reducing a defendant's sentence as part of a plea bargain that are especially subject to government influence—most notably, substantial assistance agreements and the three-offense-level discount for early pleas and acceptance of responsibility.<sup>13</sup> He deduces from these and other correla-

<sup>8</sup> Among the important "associated provisions" are the mandatory minimum sentences and other sentence-enhancing provisions of the Anti-Drug Abuse Act (ADAA) of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S. Code), and subsequent anti-drug legislation.

<sup>9</sup> See Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 20-21, 29-30 (2001) (describing how the original federal Sentencing Guidelines increased economic crime sentences above historic norms, and how the 2001 amendments to the Guidelines increased penalties for some classes of economic crime even further); see generally Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1059-63 (2001) [hereinafter Bowman & Heise, *Quiet Rebellion*] (describing congressional and U.S. Sentencing Commission actions that have heightened drug penalties).

<sup>10</sup> Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987.

<sup>11</sup> See Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 525-30 (2002) [hereinafter Bowman & Heise, *Quiet Rebellion II*] (discussing various factors, including many within the discretionary authority of prosecutors, that affect sentence outcomes).

<sup>12</sup> *Id.* at 512-24 (describing various bargaining practices and the "departures" from applicable guideline ranges that they yield).

<sup>13</sup> According to Professor Wright,

Two of the most important tools used to increase the plea discount were "sub-

tions that when prosecutors offer more sentence reductions as incentives to plead guilty, the rate of guilty pleas is likely to rise.<sup>14</sup>

I have some reservations about the notion, implicit in Professor Wright's results, that changes in prosecutorial substantial assistance practice had a significant causal relation to the national increase in guilty plea rates between 1994 and 2002. Had that been the case, one would expect to find either that prosecutors made substantial assistance motions for an increasing percentage of defendants, or that the size of the substantial assistance departures increased, or both. Yet, as shown in Figure 1, nationally the proportion of defendants receiving substantial assistance departures *declined* fairly steadily after 1996. Likewise, Figure 1 also shows that between 1997 and 2002, the size of substantial assistance departures as a percentage of the bottom of the applicable guideline range also declined slightly, while departure size expressed in number of months below the bottom of the applicable guideline range edged up slightly. It is hard to see how a declining percentage of substantial assistance motions of roughly stable size would contribute to a progressive, system-wide increase in guilty pleas.

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stantial assistance" departures that rewarded defendants with lighter sentences for cooperating with the government to develop cases against other defendants, and "acceptance of responsibility" adjustments to lighten the sentences of defendants who pled guilty early and gave the government full information about their crimes.

Wright, *supra* note 3, at 85. Downward departures based on substantial assistance to the government in the investigation or prosecution of another person are authorized by 18 U.S.C. § 3553(e) (Supp. III 2003) and U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2006). Two-level and three-level adjustments for acceptance of responsibility are authorized by U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2006). Award of the third level is possible only if the government advises the court that the defendant has provided full information about his own participation in the offense. *Id.*

<sup>14</sup> Wright, *supra* note 3, at 132 & n.161 ("Defense attorneys grumble that prosecutors operating under the sentencing guidelines can make it virtually impossible to resist a guilty plea offer.").

**Figure 1: Substantial Assistance Departure Rate & Size, 1994–2002<sup>15</sup>**

	1994	1995	1996	1997	1998	1999	2000	2001	2002
Sub. Ass't. Dep. Rate (%)	19.5	19.7	19.2	19.2	19.3	18.7	17.9	17.1	17.4
Median Decr. (Mos.)				24.0	26.0	26.0	27.0	25.0	27.0
Median Decr (%)				51.7	50.4	50.0	50.3	50.0	50.0
Nat'l Guilty Plea Rate	90.5	91.9	91.7	93.2	93.6	94.6	95.5	96.6	97.1

I do not doubt that government substantial assistance practices influence defendant plea behavior, particularly in combination with other factors included in Professor Wright's analysis. I mention the role of substantial assistance in that analysis primarily to emphasize that the mechanisms available to the government for offering a lower sentence as part of a plea bargain are numerous and are employed in myriad combinations in different federal districts.<sup>16</sup> Direct proof that the exercise of prosecutorial bargaining leverage raises plea rates would require correlating increases in the plea rate with increases in the size of the aggregate plea discount produced by all of the various mechanisms prosecutors employ—substantial assistance motions, third level of acceptance, recommendations for role adjustments,<sup>17</sup> the “safety valve,”<sup>18</sup> charge bargains, fact bargains, acquiescence in non-substantial assistance departures, etc. Unfortunately, the direct approach is probably impossible because there are no statistics on either the frequency or magnitude of many commonly offered plea induce-

<sup>15</sup> The data in Figure 1 is derived from Table 30 (size of substantial assistance departures), Figure C (national guilty plea rate), and Figure G (substantial assistance departure rates) of the U.S. Sentencing Commission's *Sourcebook of Federal Sentencing Statistics* for the years 1996–2002. The Commission did not publish data on the size of substantial assistance departures prior to 1997.

<sup>16</sup> See Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 588-91 (1998) (comparing the departure rates in the Districts of Massachusetts and Connecticut, and showing an inverse relationship between the number of substantial assistance departures and the number of nonsubstantial assistance departures); Ian Weinstein, *Substantial Assistance and Sentence Severity: Is There a Correlation?*, 11 FED. SENT'G REP. 83, 83-85 (1998) (describing study results that show no correlation between substantial assistance rates in a district and sentence length, and observing that different districts use different procedural tools to negotiate pleas and manipulate sentence lengths).

<sup>17</sup> U.S. SENTENCING GUIDELINES MANUAL § 3B1.1–.2 (2006) (indicating aggravating and mitigating roles).

<sup>18</sup> 18 U.S.C. § 3553(f) (2000); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2006).

ments. In light of that reality, one can only admire Professor Wright's study as a superb application of methodological rigor to necessarily imperfect data that provides important evidence that prosecutorial bargaining behavior has increased guilty plea rates.

His conclusion is consistent with other, cruder indicators. Several years ago, Michael Heise and I examined the marked decline in the length of federal drug sentences from 1991–2000, a decline that reversed the trend toward longer drug sentences that began with the enactment of the Sentencing Reform Act of 1984.<sup>19</sup> We concluded that discretionary choices made by prosecutors, judges, defense lawyers, and probation officers were largely responsible for the 1991–2000 decline.<sup>20</sup> Our empirical analysis suggested that prosecutors in particular made increasing use of the tools given to them by statutes, rules, and guidelines to offer ever more favorable sentencing outcomes to drug defendants. As drug sentence length fell during the 1990s, the percentage of guilty pleas steadily increased.

Events since 2000 reinforce the connection between prosecutorial sentence-bargaining practices and plea rates in drug cases. By happenstance, the period of declining drug sentences Professor Heise and I studied corresponded roughly to the tenure of the Clinton administration. In 2001, the Bush administration came into office, and its appointees in the Justice Department consciously sought to tighten plea bargaining standards, increase adherence to the Guidelines, and reverse the downward trend in sentence severity.<sup>21</sup> As Figure 2 below illustrates, federal drug cases in the Guidelines era show a notable inverse correlation between guilty plea rate and sentence length.<sup>22</sup> In general, as sentence length gradually decreased throughout the Clin-

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<sup>19</sup> See Bowman & Heise, *Quiet Rebellion*, *supra* note 9, at 1063-66 (providing data demonstrating the rise and fall of federal drug sentence lengths); Bowman & Heise, *Quiet Rebellion II*, *supra* note 11, at 483-87 (same).

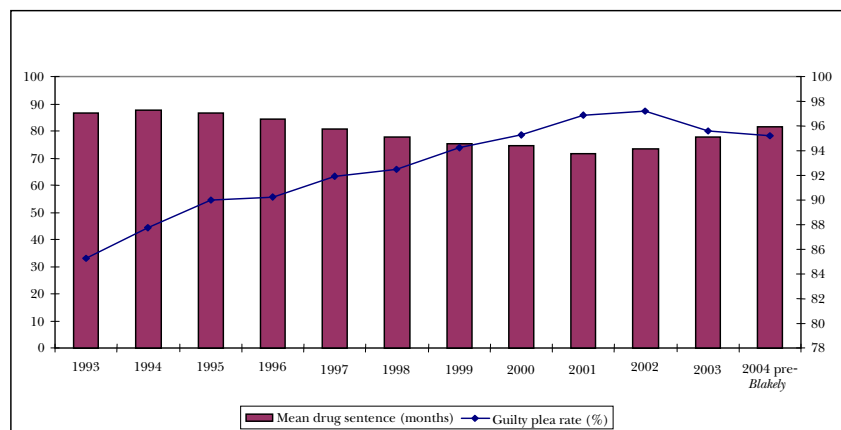
<sup>20</sup> Bowman & Heise, *Quiet Rebellion II*, *supra* note 11, at 554-55 (offering data to explain the impact of discretionary choices among actors of the judicial system).

<sup>21</sup> See, e.g., Memorandum from John Ashcroft, U.S. Att'y Gen., Dep't of Justice, to All Federal Prosecutors (Sept. 22, 2003), *available at* [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm) (requiring federal prosecutors to charge and accept guilty pleas to nothing less than the "most serious, readily provable offense" committed by the defendant).

<sup>22</sup> The mean drug sentence lengths in Figure 2 are from the U.S. Sentencing Commission's *Sourcebook of Federal Sentencing Statistics* for the years 1997-2004 (Figure E). The plea rates for drug cases in Figure 2 are from the U.S. Sentencing Commission's *Sourcebook of Federal Sentencing Statistics* for the years 1997-2004 (Table 38) and 1996 (Table 38), and from the Commission's Annual Reports from the years 1995 (Table 42), 1994 (Table 50), and 1993 (Table 55).

ton 1990s, the percentage of cases resolved by plea increased. Conversely, after the Bush administration took office in 2001 and gained solid control of the Justice Department, drug sentence length trended markedly upwards, from an average of 71.7 months in 2001<sup>23</sup> to an average of 81.3 months during the portion of 2004<sup>24</sup> prior to the *Blakely v. Washington*<sup>25</sup> decision that cast the constitutionality of the Guidelines into doubt. And, as Professor Wright would surely have predicted, the proportion of drug cases resolved by plea dropped for the first time in a decade, from 96.9% in 2001<sup>26</sup> to 95.2% in 2004.<sup>27</sup> Although one should not place too much weight on apparent correlations between only two variables in a complex system, it is reasonable to suppose that the increase in trial rate for drug cases from 2002 to 2004 was attributable at least in part to a decreased willingness on the part of Bush Justice Department prosecutors to offer plea discounts as large as those to which the defense bar had grown accustomed during the Clinton administration.

**Figure 2: Federal Drug Sentence Length Versus Guilty Plea Rate, 1993–2004**



<sup>23</sup> U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 32 fig.E (2002) [hereinafter 2001 SOURCEBOOK].

<sup>24</sup> U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 50 fig.E (2005) [hereinafter 2004 SOURCEBOOK].

<sup>25</sup> 542 U.S. 296, 313 (2004) (finding that the Sixth Amendment right to a jury trial prohibits judges from enhancing criminal sentences on the basis of facts other than those decided by a jury or admitted by a defendant).

<sup>26</sup> 2001 SOURCEBOOK, *supra* note 23, at 73 tbl.38.

<sup>27</sup> 2004 SOURCEBOOK, *supra* note 24, at 99 tbl.38.

The hypothesis that prosecutorial plea bargaining policies materially affect sentence lengths and plea rates also receives anecdotal support from the experience of the Southern District of Florida, where I served as an Assistant U.S. Attorney (AUSA) from 1989 to 1996. When I joined the office, the United States Attorney was Dexter Lehtinen, a hard-driving Vietnam veteran determined that his office would be the biggest, busiest, and toughest in the country. Once the Guidelines were declared constitutional in 1989,<sup>28</sup> U.S. Attorney General Richard Thornburgh issued a memorandum requiring that prosecutors not circumvent the Guidelines by bargaining around them.<sup>29</sup> U.S. Attorney Lehtinen resolved that in South Florida the Thornburgh memorandum would be enforced to the letter, and he policed that resolution rigorously. At the same time, he fostered an office culture in which going to trial was encouraged and rewarded. Between 1990 and 1992, when Lehtinen resigned,<sup>30</sup> the average sentence in the district jumped by almost two years, from 81 months to 104.2 months.<sup>31</sup> By 1992, 24% of all cases in the Southern District went to trial,<sup>32</sup> while the national trial rate was 13%.<sup>33</sup> But, as Figure 3 illustrates,<sup>34</sup> as soon as Lehtinen left, the average sentence began to fall while the percentage of cases resolved by plea began to rise. Yet perhaps because Lehtinen set the tone in the district at the outset of the Guidelines era, the trial culture created by his dogged (some said dogmatic and intransigent) adherence to the Guidelines persisted. It would be a decade after his departure before the trial rate in the Southern District of Florida fell to the national average.<sup>35</sup>

<sup>28</sup> See *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

<sup>29</sup> RICHARD THORNBURGH, U.S. DEP'T OF JUSTICE, PLEA POLICY FOR FEDERAL PROSECUTORS (1989), reprinted in 6 FED. SENT'G. REP. 347, 348 (1994) ("[B]argaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.").

<sup>30</sup> See Rebecca Wakefield, *Lehtinen for Mayor*, MIAMI NEW TIMES, May 22, 2003, available at <http://www.miaminewtimes.com/2003-05-22/news/lehtinen-for-mayor/>.

<sup>31</sup> U.S. SENTENCING COMM'N, 1990 ANNUAL REPORT app. B (1991) (S.D. Fla. data).

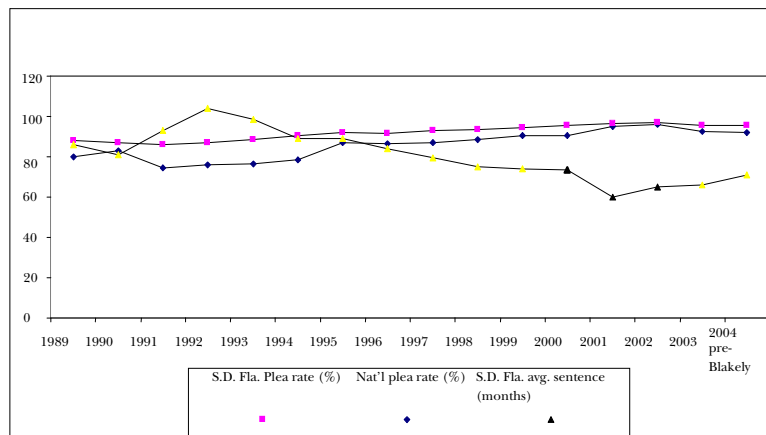
<sup>32</sup> U.S. SENTENCING COMM'N, 1992 ANNUAL REPORT app. B (1993) (S.D. Fla. data).

<sup>33</sup> *Id.* (national data).

<sup>34</sup> The data in Figure 3 is derived from Appendix B of the U.S. Sentencing Commission's Annual Report for the years 1989–1995, and from Appendix B of the U.S. Sentencing Commission's *Sourcebook of Federal Sentencing Statistics* for the years 1996–2004.

<sup>35</sup> Dexter Lehtinen's tenure as U.S. Attorney for the Southern District of Florida was, for many reasons, controversial. In describing the effects of his policies on sentence lengths and trial rates, I express no view on any other aspect of that tenure.



**Figure 3: Southern District of Florida—Plea Rate and Average Sentence**

## II. THE VANISHING TRIAL LAWYER

Professor Wright's excellent study, my work with Professor Heise on drug sentences, and my experience as a federal prosecutor convince me that there is a clear correlation between prosecutors' use of the added bargaining leverage afforded them in the Guidelines era and the increased federal plea rate from 1994 to 2002. That said, Professor Wright's work establishes prosecutorial bargaining behavior as an important *mechanism* in producing a higher plea rate, but does not answer the vexing question of prosecutorial *motive* for employing that mechanism to continually shrink the number of federal trials year after year. Even though federal prosecutors can offer large sentencing discounts to induce pleas, the percentage of pleas should increase over time only if prosecutors *choose* to offer larger discounts every year. They apparently did so, at least during the period from 1994 to 2002. But why?

The most tempting explanation would be rising caseload pressure—i.e., a perception among prosecutors that unless the government was willing to “buy” convictions with ever-higher plea discounts, the system would be overwhelmed, or at least they themselves would be crushingly overworked. But AUSA caseloads remained essentially unchanged during the 1990s.<sup>36</sup> Moreover, Professor Wright's multi-

<sup>36</sup> See Bowman & Heise, *Quiet Rebellion II*, *supra* note 11, at 557 (reporting that from 1992 to 1999, AUSAs' criminal caseload stayed roughly static, fluctuating between nine and twelve cases per Assistant per year).

variate analysis found that “prosecutors’ caseloads in a district did not affect either the guilty plea or acquittal rate.”<sup>37</sup> And my own experience as both a federal and state prosecutor tells me that, with the possible exception of some of the Mexican border districts, federal prosecutors have very modest caseloads relative to state prosecutors, and certainly do not face the kind of caseload pressure that would force a perennial choice between rising plea discounts or an unmanageable federal criminal docket.<sup>38</sup>

If heavier caseloads cannot explain higher plea rates, what can? In our study of the causes of declining federal drug sentences in the 1990s, Professor Heise and I surmised that front-line federal sentencing actors—judges, prosecutors, defense counsel, and probation officers—exercised their discretion in ways that progressively lowered drug sentences because many of them believed that “drug sentences are often, though not always, either too long as a matter of equity or longer than necessary to achieve the personal or institutional objectives of the decision-makers.”<sup>39</sup> But we never supposed prosecutors were *actively* seeking to use their sentence bargaining power to lower average drug sentences; we hypothesized only that drug sentences were high enough to render prosecutors pliable in their interactions with others in the system who were actively seeking reduced sentences through negotiated pleas. Pliability is hardly the same thing as aggressively wielding prosecutorial power to induce pleas and discourage trials.<sup>40</sup>

In truth, I know of no entirely satisfactory explanation for the federal system’s increasing affinity for negotiated pleas rather than trials. I strongly suspect that part of the answer lies in changing institutional values in the judiciary and the Justice Department. In my professional lifetime, efficient case management has become a matter of ever-greater consequence to federal judges. Busy judges in any era have a natural bias in favor of bargained resolutions over time-consuming

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<sup>37</sup> Wright, *supra* note 3, at 149.

<sup>38</sup> My personal practice experience is consistent with available statistics. See Bowman & Heise, *Quiet Rebellion II*, *supra* note 11, at 556 (revealing that, in the past, state prosecutors have carried caseloads up to thirteen times greater than those of AUSAs).

<sup>39</sup> *Id.*

<sup>40</sup> In any event, drug cases make up only 40.5% of the federal criminal docket, and plea negotiation practices in that class of cases alone could hardly account for the steady rise of pleas across the federal board. U.S. SENTENCING COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 11 fig.A (2003) [hereinafter 2002 SOURCEBOOK].

trials, but that bias is palpably stronger in modern federal district courts.<sup>41</sup>

Similarly, the Justice Department has become more attuned to “outputs,” pressing U.S. Attorneys for measurable results in terms of numbers of cases processed, either to trumpet the success of an administration crime initiative, or to demonstrate tangible results in crime types that have become the focus of congressional interest. This shift to volume-based measures of success and the concomitant emphasis on efficient case processing have even altered the Justice Department’s traditional attitude toward the law itself. For example, in the past four or five years, the Department has begun arguing for enhanced guideline or statutory sentences, not because the enhancements are inherently just or required for adequate deterrence, but precisely because higher sentences provide increased plea bargaining leverage.<sup>42</sup>

A comprehensive explanation of the vanishing federal criminal trial is unlikely to be found among factors particular to the federal criminal system. Trial rates, state and federal, civil and criminal, are plunging together. Even adversary proceedings in federal bankruptcy court are declining steadily.<sup>43</sup> But regardless of the first causes for the trend to ever-fewer federal criminal trials, I would suggest that the antitrial culture has become so pervasive and the number of trials so small that the federal system may have passed a tipping point at which the declining number of trials has itself become a self-reinforcing cause of further declines. Which brings us to the phenomenon of the

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<sup>41</sup> See, for example, the 2003 testimony of the chief judges of the Southern and Central Districts of California before the U.S. Sentencing Commission, in which both advocated for the creation of a Guidelines “fast track” provision, permitting enhanced plea discounts for defendants who plead guilty particularly early in districts with very high caseloads. *Implementing Requirements of the PROTECT Act: Hearing of the U.S. Sentencing Comm’n* (2003), available at [http://www.ussc.gov/hearings/9\\_23\\_03/9\\_23\\_03.htm](http://www.ussc.gov/hearings/9_23_03/9_23_03.htm).

<sup>42</sup> See *Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004: Hearing on H.R. 4547 Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 6 (2004) (statement of Catherine M. O’Neil, Assoc. Deputy Att’y Gen.) (arguing in support of increased mandatory minimum sentences in some drug cases, because the threat of longer sentences allows the government to move “effectively up the chain of supply using lesser distributors to prosecute larger dealers, leaders and suppliers”); Sue Reisinger, *Government Seeks Tougher Sentences*, NAT’L L.J., Mar. 10, 2003, at A20 (quoting a senior Justice Department official as arguing for across-the-board economic crime sentence increases to provide leverage to secure cooperation from smaller-time defendants).

<sup>43</sup> See Elizabeth Warren, *Vanishing Trials: The Bankruptcy Experience*, 1 J. EMPIRICAL LEGAL STUD. 913, 922-37 (2004) (noting and analyzing the decline in adversary proceedings in the bankruptcy system).

vanishing federal criminal trial lawyer.

The public image and self-conception of federal prosecutors is of a select cadre of veteran trial lawyers. Yet current statistics belie the image and suggest that the lives of federal prosecutors increasingly resemble the “litigators” of civil practice who spend their lives processing cases, but never actually trying them. The numbers are striking. In 2002, there were 5,304 AUSAs,<sup>44</sup> but fewer than 2,000 trials.<sup>45</sup> Even making the generous assumption that every trial was staffed by two or more AUSAs, fewer than four out of five AUSAs had so much as a single trial in 2002. Over time, numbers this low mean that the average AUSA will go to trial less than once a year.<sup>46</sup> The situation in many districts is even starker. In 2002, thirty-one out of the ninety-four federal districts saw fewer than ten trials.<sup>47</sup> The two districts covering the state of Wisconsin boasted eleven trials between them.<sup>48</sup> Vermont reported zero trials in 2002 and only two in 2001.<sup>49</sup>

In an environment like this, over time U.S. Attorneys’ Offices will contain fewer and fewer real trial lawyers—those with the skills, judgment, and self-confidence born only of long courtroom experience. Becoming a real trial lawyer takes years of practice and constant exposure to the cut-and-thrust of many trials. Once the skills are acquired, they have to be used to be maintained. With trial rates at their current nadir, lawyers who come to a U.S. Attorney’s Office with no trial experience won’t get any. Those who had some can’t hone it. Those who once had lots are losing their edge.

In an office where trials are frequent and valued for their own sake, winning and losing matters less than a willingness to accept battle. But as the number of trials decreases, the attention each trial receives within the office increases, as does the potential professional risk to any lawyer involved. In an office staffed mostly with trial novices and out-of-practice veterans, rare trials loom as daunting events,

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<sup>44</sup> Wright, *supra* note 3, at 120 n.116.

<sup>45</sup> 2002 SOURCEBOOK, *supra* note 40, at app. B (national Data).

<sup>46</sup> The precise ratio of criminal trials to federal prosecutors is difficult to calculate. A fraction, perhaps one-fifth, of AUSAs are assigned wholly or partially to civil work, a fact that increases the average number of cases tried by criminal AUSAs. However, some (small) fraction of federal criminal trials are not handled by AUSAs, but by trial lawyers from the Criminal Division of the Department of Justice in Washington, a fact that reduces the average number of trials per criminal AUSA.

<sup>47</sup> 2002 SOURCEBOOK, *supra* note 40, at app. B.

<sup>48</sup> *Id.* (Wisconsin data).

<sup>49</sup> *Id.* (Vermont data); 2001 SOURCEBOOK, *supra* note 23, at app. B (Vermont data).

pregnant with the potential for embarrassment and failure. I think it likely that lawyers in such an office will shy away from trial, even in cases that ought to be tried, preferring the less risky and now institutionally ordinary practice of buying a plea with a little extra sentencing concession. And the fewer cases an office tries, the higher the psychological barriers become.<sup>50</sup>

The suggestion that low trial rates have become their own cause receives some support from the experience of the last six years. As noted above, beginning in 2001, as the Bush Justice Department tightened plea bargaining policies, sentence lengths rose (presumably as a result of reduced plea discounts) and plea rates fell. Yet the decline was very modest—from 97.1% in 2002 to 95.5% in the pre-*Blakely* portion of fiscal year 2004.<sup>51</sup> If plea rates were really as “price sensitive” as Professor Wright’s findings about prosecutorial influence imply, one might have expected a bigger effect. Perhaps more revealingly, in the three years since *Blakely* was decided in June 2004—a period in which prosecutorial control over sentencing outcomes has at least been relaxed, though hardly relinquished—the plea rate has hardly varied at all. Indeed in 2006, the year after *United States v. Booker* declared the Guidelines “advisory,”<sup>52</sup> both the plea rate and the average federal sentence were *higher* than before *Blakely*.<sup>53</sup> In the face of all the *Blakely-Booker* turmoil, something seems to have kept the no-trial culture of the federal courts remarkably stable.

### III. THE RISING ACQUITTAL RATE

Which brings me to the puzzling phenomenon of the disproportionately declining federal acquittal rate. Intuitively, one would think that, as trials are squeezed out of the criminal system, the remainder would disproportionately be cases in which defendants knew them-

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<sup>50</sup> I hasten to add that the Department of Justice is still home to many of the best trial lawyers in America. But I think it idle to deny that the culture of U.S. Attorneys’ Offices has tilted steadily away from the trial lawyer ethos.

<sup>51</sup> Compare 2002 SOURCEBOOK, *supra* note 40, at 21 tbl.10, with 2004 SOURCEBOOK, *supra* note 24, at 41 tbl.10.

<sup>52</sup> See *United States v. Booker*, 543 U.S. 220, 264 (2005) (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”).

<sup>53</sup> In 2006, the plea rate was 95.7%, U.S. SENTENCING COMM’N, 2006 SOURCEBOOK OF FED. SENTENCING STATISTICS tbl.10 (2007) [hereinafter 2006 SOURCEBOOK], compared with 95.5% in the pre-*Blakely* portion of fiscal year 2004, 2004 SOURCEBOOK, *supra* note 24, at 41 tbl.10, while the average (mean) federal sentence was 51.8 months in 2006, 2006 SOURCEBOOK, *supra*, at tbl.13, and 50.1 months in the pre-*Blakely* portion of fiscal year 2004, 2004 SOURCEBOOK, *supra* note 24, at tbl.13.

selves to be wrongly accused and thus insisted on a chance at vindication, or at least those in which their lawyers felt the chance of success at trial to be high enough to forego the offered plea discount. Yet the reverse seems to be happening.

Professor Wright attributes the disproportionate decline of acquittals to many of the same factors that caused the decline of trials, in particular the exercise of enhanced prosecutorial bargaining power in the sentencing guidelines age.<sup>54</sup> I confess that I am not entirely convinced. At the least his account lacks a fully convincing explanation of why and how prosecutorial power is being used to induce a *disproportionate* fraction of defendants with strong, triable cases to plead guilty. Which is not to say that I have a better explanation. My only tentative suggestion is that part of the explanation may lie in the phenomenon of the vanishing federal trial lawyer.

I suspect that one consequence of vanishing trials and trial lawyers is an ever-rising incentive to ensure that one wins those cases that do go to trial. A prosecutor's office staffed with experienced trial lawyers and institutionally committed to trying cases should not only try more cases, but should be willing to go to trial in tougher cases—cases with less-than-overwhelming odds of success, or cases somewhat more likely to produce an acquittal. Conversely, given the immense prosecutorial bargaining leverage Professor Wright correctly describes, prosecutors made cautious by inexperience and office culture may be especially likely to make risky cases go away, leaving little but “slam dunks” for trial. Moreover, I wonder if the decline in federal trials has had a similar effect on the defense bar—depriving defense attorneys of experience, creating a culture of accommodation and a generation of defense counsel readier than its predecessors to convince clients to accept pleas in triable cases. In short, I suspect the disproportionate decline of acquittals may be a predictable outcome of the decline of the trial lawyer among prosecutors and defenders alike.

#### CONCLUDING THOUGHTS

Professor Wright suggests that trials and acquittals could be increased by reforming current sentencing arrangements to give prosecutors less control over sentencing outcomes.<sup>55</sup> He may be right, but I

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<sup>54</sup> See Wright, *supra* note 3, at 116-17.

<sup>55</sup> See *id.* at 151 (“[T]he most important target in reforming sentencing law should be rules that currently give prosecutors monopoly power to link sentence discounts to the defendant’s choice to plead guilty.”).

fear that the degradation of federal trial culture has progressed so far that not even a return to the days of unfettered judicial sentencing discretion would do much to reverse the trend.

On a broader and concededly more speculative note, I fear that the gradual disappearance of the federal trial lawyer has ill effects beyond trial and acquittal rates. Those who know and relish trials are not afraid of them. They like a fair forensic fight. They believe a defendant ought to have his day in court if he wants it. They understand that there is usually something to be said on both sides of any case and that judging human behavior inevitably involves shades of grey. They tend to be confident that the ordinary citizens who make up juries, while not perfect factfinders, generally sort things out pretty well. Perhaps for these reasons, trial lawyers are disposed to trust ordinary criminal processes to deal with even extraordinary cases.

Trial lawyers have faith that truth must be sought and justice done without official brutality or oppression. But they have the realist's understanding that the cost of foregoing police-state methods, the cost of preserving the liberties enshrined in the Constitution, is some tragedies unprevented and some crimes unpunished. And, although I may be too sanguine, a long career among them suggests that trial lawyers are less inclined than those who have never addressed a jury to view criminal justice through a political lens. Rather, they tend to view themselves as apolitical inheritors of an Anglo-American tradition of adversarial justice that has value independent of partisan interests.

People who see the world this way have been in perilously short supply in the higher counsels of American government in recent years. As their number dwindles, so too does the number of defenders of the values of adversarial fair play essential to the American idea of justice. In the long run, the extinction of those values would be the greatest tragedy of all.

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